GREAT SPEECH

OF

HON. WILLIAM M. EVARTS

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RAPID TRANSIT.

NEW YORK:
EVENING POST STEAM PRESSES, 208 BROADWAY, CORNER FULTON STREET.

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ARGUMENT

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HON. WILLIAM M. EVARTS.

Mr. Evarts opened for the plaintiff as follows :

If your Honor please :

This action, an equitable one, is brought by the Sixth Avenue Railroad Co., a corporation created, authorized and employed for the transfer of passengers in this city, in accommodation of the public needs and in co-operation with the other avenues by which the needs of the public are also served by similar modes of transfer, to wit, a horse railroad company. These rights are vested in it by an authentic contract between the city of New York and this association, as it then was, now corporation, confirmed by the Legislature of the State and now unquestioned. The part of their route as the principal part of their line, which is now brought in question by the interference of the defendants, of which I am to speak, is the Sixth avenue ; for there at the time and before the filing of this bill the threatened invasion of their rights and interference with their enjoyment of the street for the purpose of the transfer of passengers was interdicted.

The bill sets out with entire completeness the manner and form through which this plaintiff became vested with its rights in the street, and with its important faculties and powers, in substance, and it is not necessary now, for the whole subject is familiar to your Honor, and every day's observation shows what the business is and how it is conducted. The business of this company is substantially this, that the corporation of the city of New York having such title in its streets as a matter of proprietary ownership and of public trust and duty as grows out of the condemnation or cession of this street property, the

fee of the street, made to them under the laws of 1813, and in subsequent changes of those laws granted the right to this association to construct and operate a certain railroad for cars driven by horses and with tracks regulated by the Common Council, and with time and frequency of the running of the cars, in some degree at least, regulated by the Common Council. And thereupon this association took upon itself a corporate form, and by the Legislature of the State was confirmed in these rights. All the elements of a definite and valid contract between the city of New York and this corporation are disclosed in the documents relating to the subject, and whatever there is of constitutional predicate of contract as between private parties as against invasion by legislation of the State or other action of State authority, is possessed by this corporation in respect to these rights and privileges and property under the contract concerning the same with the city of New York. So strong and important, so definite and efficient is this right by contract from the city, that in an exploration of the basis of it in the authority of the city, the highest court of the State determined that it was, ever is, definite, and so durable an operation of right in the streets of the city that it was incompetent for the said authorities unaided by State legislation to confer it. That it gave a freehold interest in the streets of the city for the purposes of the public trust and use of a horse railroad, and that under the authorities then existing in the government of the city of New York, it was incompetent for them without an enabling act, although they had the fee of the street, although they had the whole administration of the use and employment of the street for traffic either of persons or of merchandise; yet they could not so interfere with the general and vested right as to impress as definite and durable authority upon the action of any selective creatures, and thereupon authority of the Legislature was given with full consideration of the consequences that would come from any such confirmation of authority to this railroad company, and it now possesses it.

What I have said of this railroad company is, I understand, substantially, if not entirely, true of all the other horse railroads, that in their collective agency are transferring now, day by day and hour by hour, the public of this city as the calls of business or pleasure invite from one part of it to another. It will be seen, then, that no question, if doubt be thrown upon

the tenure, the verity, and security of this property of this road and of all these other roads, no question can affect either older private interests or greater public convenience and use than attends this very franchise now exercised and now brought into defense of itself against invasion.

Following upon this confirmation of their rights, large expenditures have been made by this railroad company of amounts numbered by millions of dollars, and now, with the acceptance and constantly increasing approval of the public of this city within those limits that are imposed by the necessity of keeping the streets open for the general use of the public, and of having a railroad therefore that is incompatible with the occupation of the abutting lots for the purposes of business and residence, this railroad, these street railroads, are now performing principal service in the conveyance of passengers up and down this island.

I will ask your Honor's attention to the magnitude of the service they perform, for it bears definitely both upon the question of the value of the public service in respect to the volume of it and to the convenience of the public, and directly further upon the question how the interference of which we complain, and which we bring definitely to your Honor's apprehension, does operate in restriction of its public service and in restriction of its corporate rights. The entire railroad transfer of passengers in all the steam railroads of this State, in combined length of 9,000 miles, is but 35,000,000 of persons in a year. This Sixth Avenue Railroad moves 16,000,000 on its own line in a year. The Third Avenue Railroad moves nearly twice as many; and the Eighth, and perhaps the Seventh, transfer a larger number than the Sixth. Your honor sees, therefore, the magnitude of any steam apparatus in respect of track, or trains, or engines, that can undertake to compete with this, with these modes of transfer in meeting the objects and desires of our public.

It opens our observation also to the obvious requirements of the structure and the equipment to be operated by steam, and induces a comparison thereof, both in respect of the public convenience that may be fairly hoped or imagined to be reaped from it as compared with what is now served by these horse railroads, and if that public convenience can be expected to be subserved from the magnitude of the operation of this enginery, and upon this structure, that must be all the while

going on within the narrow limits of a street of the city of New York.

Now, the defendant is also a corporation, deriving its power from legislation of the State, created by a special charter, with well defined and well circumscribed authority in respect of its functions, its faculties, its structure and its appliances. The legislative will has been, whether intelligently or not, with considerable circumspection and fidelity, undertaken to protect the streets of the city both in the rights and benefits of occupation by the abutting proprietors, and in the needs of the public for business and for passengers in the traffic on the street itself against invasion and interference. When we come to consider the power which the act incorporating this defendant's corporation confers, if it were a practical question, your Honor would be called upon to determine whether that was an excuse of legislative authority, whether it did invade the rights of property, whether of abutting proprietors or of this corporation, or the rights as *cestui que trust* in the right of this avenue for traffic on the part of the public at large; but that act will now be considered by your Honor only sufficiently to determine that in the construction of it, in its actual form and proportions, an interference with private and public interests in the streets is attempted by the corporation in the actual movements towards the foundation and the superstructure of this railroad track, only sufficiently show that there is in this special act of incorporation no pretense of authority to go on with any such structure as is predicated at the moment. And the answer of the defendant leaves us no doubt, by their distinct admission of the actual character of the structure, that they are proposing, being, as we say in our bill is "threatened," precisely that and nothing else, that this special incorporating act does not give them authority for.

When by an act passed in 1875, said to be, indeed, by the amended Constitution, which went into effect prior to its passage, required to be general in its nature, it is supposed by these defendants that there were acquired by them certain added powers and faculties, and choice in respect of their route, and of their structure and its operation which were not included in the statute by which they were incorporated, and that between the upper and the nether millstone of a special act of incorporation passed before the amended Constitution prohibited such legislation, and the subsequent Act of 1875 which

they claim to be general, lodging in the commissioners power to modify and repeal and reform that special act of incorporation, between the upper and nether millstone of these co-operative legislations—the Constitution, and the rights and interests; that this clause of it was framed in the presence of a great and immediate danger of these rights to protect are to be ground to powder.

I will ask that a copy that we have had printed of the Gilbert Elevated Railroad Act, with the various amendments, shall be handed to his Honor. This was passed in 1872, and we have printed the original act, and all the amendments and extensions of time or authority since.

This is a corporation created by a special act. The title of it is "An Act to incorporate the Gilbert Elevated Railway Company, and to provide a feasible, safe and speedy system of rapid transit through the city of New York." The third section expressly defines the authority and powers conferred. Certain authority under the general Railroad Act of 1850 is conferred upon this corporation, and the special authority then proceeds: "And the said corporation is hereby authorized and empowered to make, construct and maintain an elevated railway, to be operated by the plan known as the 'Gilbert Improved Elevated Railway,' over, through and along streets, avenues, thoroughfares and places in and of the said city of New York, and to construct, maintain and operate the said tubular ways and railways by atmospheric power, compressed air or other power, together with the necessary sidings, stations, switches, turnouts, platforms, stairways, elevators, air reservoirs, and connecting tubes for the transmission of power, telegraph and signal devices, and other appliances requisite to convey passengers, mails and merchandise as contemplated by this act, and in the said system of railways over the streets, roads, squares and avenues herein mentioned."

Commissioners are to be appointed to determine what route in the city may be accessible to this company for the purpose of its construction and its operation, and then the provisions in the fourth section show a complete adherence to the restrictions of the third. "For the purpose of making, constructing and operating said tubular ways and railways, said corporation is hereby empowered to enter upon and across the several streets, squares and avenues and land herein provided for."

It is a limit of their power to commence and enter upon the *locus in quo* for the purpose of their corporate powers.

"Such railways to be constructed in the most thorough and artistic manner, and of sufficient dimensions for the purposes of said tubular ways and railways, and at such heights above the streets, squares and avenues so designated and established as will, when completed, insure *the unimpeded traffic and travel in the same.*"

Whatever power this corporation took was a power limited by the requirements that it should not interfere at all with existing rights of traffic and travel.

"The said tubular ways and railways the said corporation is hereby authorized and empowered to construct, maintain and operate shall be substantially supported *above the middle of the streets* and avenues by iron arches, which *shall span the same from curb to curb*, the bases of which shall not, when practicable, be more than sixty feet apart, nor the arches less than fifty feet from each other."

There is in the statute a requirement that their structure must be of such a kind as will not take away an inch from the traffic way of the streets, nor disturb by noise or jar, or otherwise, the uses of the streets for general and common traffic; but not satisfied with that restriction which the courts of justice might well have been left to protect to the full extent of the public interests, as applied to their adjudication, if it had been left thus, the statute proceeds to say that these conditions of non-interference shall be preserved.

"Shall be substantially supported *above the middle of the streets* and avenues by iron arches, which shall span the same from curb to curb, the bases of which shall not, when practicable, be more than sixty feet apart, nor the arches less than fifty feet from each other."

That is to say, whenever it would be practicable for the purpose of the public convenience, in the judgment of these commissioners, to use public streets that were more than sixty or only sixty feet between curb and curb, that practicability, limiting the arches to sixty feet, should be, as an element of choice, preferred by the commissioners and that route selected; and it happens to be, either by casualty or good fortune (and no doubt that operated in the minds of the commissioners), that the Sixth avenue is *precisely sixty feet from curb to curb;* that other avenues may

be wider, and might have been, but for that greater width, as suitable, perhaps more suitable, for the route of the road; but this statute kept them within such limits as that it must be at least sixty feet, and for considerations with regard to the expense and strength. Sixty feet being regarded, the other condition from curb to curb would not be insisted upon, which admitted of from curb to curb, and sixty feet concurring in the dimensions.

Now, as to the lengthwise separations. If it be pleaded that this limitation in regard to the sixty feet has no reference to the dimensions across the streets, but that it has reference only to the lengthwise separations of the arches and the bases, then we have nothing but the requirements of from curb to curb, and for all purposes here—and I have only alluded to these matters of sixty feet in order to show that this avenue did concur with this arrangement—then you have the requirement as to the proximity with which these crosswise partitions, so to speak, shall be allowed, and that is that the extension of the bases of the supports shall not be more than sixty feet apart, nor the arches less than fifty feet from each other. The limitations from curb to curb apply within the sixty feet, and then the limitations as to the lengthwise arrangement that these supports are to be not more than sixty feet when practicable, nor the arches less than fifty feet from each other. That means the arches in the clear, I suppose.

Now, whether an equal and definite attention to the degree of even conjectural and dubitable interference with the traffic and travel of the avenue or streets should be possible under this act, separating it from judicial discretion to that extent, requires an observation of this measure of remoteness and infrequency between the arches. Although there could be no bases, no supports, except what were in the line of the curbs, yet even they were not allowed to be more frequent than the interval of fifty feet between them.

Now, the fifth section gives to the corporation the right of acquiring property to "enable it to construct, maintain and operate the said tubular ways and railways, and the motive power thereof."

The sixth makes it a railroad exclusively for the uses of the corporation; excludes everybody other than public officers from going upon it at all in other connection, of course, than with the approbation and for the purposes of the corporation

and with their consent. "The municipal authorities of the city of New York are hereby prohibited from giving any permission to any other person, body, or corporation, to do any of the acts or things hereby authorized, but shall at all times, as far as practicable, aid the said corporation in carrying out the provisions of this act."

The time limited for the execution of this work authorized is fixed by this statute, and the subsequent acts seemed to my observation to be entirely confined either to questions of right or the extension of time for the performance of the work.

Now, if your Honor will look at Schedule A, which follows the bill, you will see the railroad known as Gilbert's proposed City Elevated Railway, and which is referred to—I don't mean this picture—but which is referred to. This Gilbert proposed Elevated Railway is referred to distinctly in the act as a known and fixed plan and method, and at all events for which alone authority was asked from the Legislature; for which alone authority was given by them in respect of this structure and its motive power, and which included in its provisions, in observing the public and local interests of the avenue, those conditions of absence of noise and absence of exposure of private residences to the gaze of passengers, which to every one's observation constituted a primary element in determining whether or no such a use or employment of any of the avenues of this city can possibly be permitted by the Legislature.

The bill shows this was the method, and the published method, and the understood method, that was covered by the brief phrases of law which adopted it as a measure, and the limit and description and the kind of road for construction and operation which was to be tolerated, compatible with the interests of the public and the city, and the provisions of the law show that.

Now, some question may be made, for aught I know, in the trial, as was indicated in some of the affidavits, as to whether or no this was not a plan, a model, or publication made for effect in this suit, and whether it was or not an adoption of an earlier and different method, contrived and not insisted upon and not proposed by the Legislature, and not acted upon by them, and not described by the language of the law.

Now, I hold in my hand a sheet taken from the issue of the *Scientific American* of April 13th, 1872. This bill was introduced in the Legislature on the 17th of March, 1872, and was

passed on the 17th of June; and here on the 13th of April we have the actual publication, presentation of the public interests to be looked at by the citizens, to be judged of by the Legislature, in order that it might be known and understood what kind of a structure it was that was sought to be authorized; that was described as the plan of Gilbert; that citizens, either in general as property holders, and having the use of the streets at their service, or abutting proprietors upon the projected line, could attend to, and be opposed to it if they thought best. It is there described as "Gilbert's proposed City Elevated Railway," precisely what our reproduction of it describes in this Schedule "A" to the bill, and this is the introduction of it to the public in this *Scientific American* newspaper:

"Among the recent projects for rapid transit in New York is that of Mr. R. H. Gilbert for an elevated railway, on the plan so tastefully represented in the accompanying engraving.

The plan is to place along the street, at distances of from fifty to one hundred feet, compound gothic iron arches, which shall span the street from curb to curb, at such an elevation as shall not interfere with the ordinary uses of the street. On these arches, a double line of atmospheric tubes, eight or nine feet in diameter are to be secured. The arches are strongly connected with each other by means of a vertical, latticed or trussed girder running between the tubular ways, which are to be firmly joined to it on either side by ties of suitable construction. Through the tubes, supported as described, cars carrying passengers are to be propelled by atmospheric power. There is also provision in the same set of arches for two or more sets of tubes for the transportation of mail and packages. The stations will be situated at distances of about one mile apart along the line, and will be provided with pneumatic elevators to raise passengers to and from the place of transit with perfect safety, thus obviating the necessity of going up and down stairs for transit.

The movement of the cars or trains along the line, as well as their arrival and departure from stations, is made known at all points by a telegraphic device, which is automatically operated by the cars in passing.

A bill is now before the New York Legislature to authorize the construction of this work, which, it is alleged, can be economically and expeditiously executed.

The bill has been favorably considered and reported by the Senate Committee, and meets with no opposition except on the part of the property owners and occupants of buildings on the streets which are intended to be occupied by the works. These people object to the erection of this ornamental structure or big bridge, as they term it, in front of their doors, and claim that the presence of the tubes would be equivalent to the roofing over the street.

They will consent to nothing that cuts off their light and air.

Everybody in New York wants rapid transit, but, strange to say, the moment that anybody sets to work with a definite plan for its realization, they are vigorously opposed and the work prevented."

Now, it will be a matter of proof that this was the plan, this the subject, this the model, this the pretension, and this scientific and intelligent exposition of the limit of its interference with private property, that touched nothing but light and air, and did not interfere with traffic, and had no terrors of noise or rattle of steam, but was to be the silent transfer, as by the magic of a pneumatic power through these air-tight cylinders, obstructing only light and air.

Now, as the method upon which the corporation has entered upon the streets and was proceeding to lay the foundation and build the superstructure is wholly discordant both with respect to the limitation "from curb to curb," separation longitudinally of its posts and partitions, openness of their enginery, and the adoption of the steam motive power, with all the force, and so with all the terrors and the dangers that belong to that agency in a crowded city, your Honor sees at once that there must be some other power and authority to justify what is proposed to be done, commenced to be done, admitted to be proposed to be done, and admitted to be commenced to be done by this corporation.

Intermediate between the passage of these acts relating to the Gilbert Elevated Railroad, and the passage of the act of 1875, an amendment of the Constitution took place, in which the fundamental and paramount law of the State undertook to deal with the subject of railroads in the street. Among the subjects of legislation prohibited to the Legislature, except in public laws, the 18th section includes this "granting to any corporation, association or individual, the right to lay down

railroad tracks; granting to any corporation, association or individual, any exclusive privilege, immunity or franchise whatever," and then this injunction: "the Legislature shall pass general laws providing for cases enumerated in this section, and for all other cases which, in its judgment, may be provided for by general laws."

There was then operating, by these two clauses of prohibition and authority, a confinement of the legislative power to deal with the subject of railroad tracks of any kind, only by general legislation; and if it stood only there, I should, without fear of your Honor's dissent on examination and reflection, challenge this law as a violation of this clause of the Constitution in the passage of a private railroad law; if not a passage of a private law by the Legislature in terms, yet on its face not a general railroad law, and in its terms failing to be expressly and distinctly private legislation only by making a private legislative function and service to be performed by a commission wholly intolerable to the constitutional power of the Legislature outside of this question of restriction. But the clause of the Constitution proceeds with greater explicitness, and in a manner that no one can fail to understand: "*but no law, private or public, local or general,* shall authorize the construction or creation of a street railroad except upon the condition that the *consent of the owners of one-half the value of the property bounded upon,* and the consent also of the local authorities having the control of that portion of the street or highway on which it is proposed to construct or to build such railroad, *be first obtained;* or in case the consent of such property owners cannot be obtained, the General Term of the Supreme Court in the district in which it is proposed to be constructed may, upon application, appoint three commissioners, who shall determine, after hearing all parties interested, whether such railway ought to be constructed, and their determination may be taken in lieu of the consent of the property owners."

All this operation of a *quasi* judicial court, your Honor observes, is limited entirely to the mayor and aldermen, unless the consent of the property owners being withheld, the Supreme Court shall, in its judgment, appoint commissioners to be substituted in lieu of and for that failing requirement.

At present I am only to ask your Honor's attention to the kind of structure which is sought to be authorized under the Act of 1875, and I do not at present call attention to any of

the legal provisions of the act as questionable in a constitutional point of view, or in respect to the construction that is to be put upon them if they are valid, but only to the contrivance of the road, as alleged in the bill and admitted in the answer, that this Gilbert Elevated Railroad Company is expected to construct.

In the 7th article of the bill is the allegation, which is admitted in the answer, that they have "undertaken and intend, unless prevented from doing so, to construct and operate, along said Sixth avenue, between Amity street and Fifty-ninth street, directly over that part of the plaintiff's railroad which runs along said avenue between those streets, an ordinary elevated railroad, to be worked by means of steam locomotive engines instead of an application of atmospheric power, and to be supported on straight transverse girders instead of arched ones resting on iron columns, which, instead of being placed at the curbstones of said avenue, and not less than fifty feet apart, longitudinally, are to be set in the roadway of the said avenue close along and on each side of the plaintiff's said railroad, about twenty-one feet apart transversely, and about thirty-five feet apart longitudinally, and which girders, instead of spanning the said avenue from curb to curb, are to span only the plaintiff's said railroad; and which elevated railroad, that the said defendants have so undertaken and intend to construct and operate as aforesaid, instead of being from thirty to forty feet above the level of the said avenue and enclosed in iron tubes, which conceal from sight the movement of cars upon the same and the action of its motive power, is to be only from twelve to fourteen feet above the level of the said avenue, and is to be so constructed that the movement of its cars and the action of its locomotives are to be plainly in sight from each side of the said avenue and from the plaintiff's railroad tracks; and for the purpose of constructing such a kind of elevated railroad as the defendants have so undertaken and intend to construct and operate as aforesaid, instead of such tubular railway, they have unlawfully entered upon the said Sixth avenue at different points," etc.—they have entered upon the street, and are proceeding *upon* the street.

Now, the 8th section sets out the injury to the buildings, and the 9th the mode and form of injury and interference, both in the general and in the special interests of this track, and of the plaintiff as proprietor of a considerable area of property abut-

ting upon the avenue, which this method of construction introduces, and which could not operate, *would* not operate, under the method authorized by the Gilbert Act.

To the eye it is very apparent how great a change in the public and general use of this avenue will be made by this structure. If it be lawful, and by paramount authority, then like any other despotic legislation that crushes private interests, destroys private property, it has its course, like the car of Juggernaut, over the prostrate rights and the liberties of the people.

I am now only considering what, *indisputably*, are the interferences which this structure will produce with regard to the common interests of the public use of the streets, and with regard to the direct corporate rights and interests of these plaintiffs' corporation, and the abutting proprietors. See how carefully the Legislature, when it had power, within the functions of legislation and the observance of the general guaranties of property by the forms of the Constitution, to authorize an elevated railroad—see how carefully it proceeded ; how it limited the possibility of the structure, and the motive power from being extended by construction, and how, besides the definite geometrical restrictions in measure that it gave, it gave the further restriction that it should not interfere at all with private traffic and general use. Whether or no this be a useful structure which induces and justifies the destruction of this avenue as a public street of this city, which destroys its surface as a line upon which houses and stores are to be built and occupied, that it makes the running of this road of these plaintiffs compatibly with their just emoluments and with the public service which should be performed, there can be no doubt.

Your Honor sees at once upon this model, which is accurate, precisely what the form and nature of this use of this avenue, as compared with its existing uses, and with what are familiar to us in all our experience and what a change in the nature of things from what a public street is, " and of right ought to be," by this invention, this corporation with its pretentions will effect. Here is a street that the demands of travel required should be sixty feet wide in its carriage-way, and the sidewalks unimpeded, and never has anybody suggested that the constantly swelling tide of traffic and travel built up in faith upon the permanent security and the adequacy of this avenue for the increasing tide of its business should call for or

tolerate any reduction of it : and yet by this structure confessedly posts only twenty-two feet apart in *this* way and only thirty-five feet apart in *that* way, are to be concentrated upon this open passage-way of the street. Thus, lengthwise, this avenue is to be divided into three narrow lanes, one of which, occupied by our railroad track upon the surface, is to be twenty-three feet wide and at the sides there are to be lanes each seventeen feet wide, and then for the purpose of transverse passage over this track of ours kept by us if the service is to be continued for public needs and our private rights to be by possibility accommodated to this intrusion, there are, as it were posts or partitions, numerous, frequent, near one another, separated only by thirty-five feet. In each block between the streets there will be six pairs of these posts, making six compartments in the street as well as its division into lanes. No reasoning, no imagination can get rid of the principal and conclusive fact these intrusions upon the roadway of the public street are interferences with it as a public street. That it is no longer the street that it was before ; that it is incapable of the uses that it was capable of before, and that if the structure had been allowed under a claim of right without authority of law, or if they had been authorized by law as mere interferences with the use of the street as it had heretofore been used, the efficient, the permanent and the constant consequences would have been that the street would be no longer a public street of its dimensions.

For the purposes of this interference I now only talk of the elevation of these posts, supposing that there was no structure over them, no railway to be put over them. That would be infinitely less interference with the public street than they are when they are completed in their design by the superstructure and the attendant use. But if the posts had been there, and that alone realized, is there any doubt that any person injured by them, if they were put there without authority of law, would have had the summary remedy of leveling them to the ground and a direct personal action against whoever was responsible for putting them there and against the city of New York, that, knowing of their existence, permitted them to stand, obstructions to the common way?

Is not that the law of the highway? Is not that the law of the public streets? And does it need any confirmation of the necessary, of the universally approved personal right to overthrow

the structure and to obtain damages for the injuries that may have occurred from its presence? The importance of this suggestion will appear to your Honor when you come to consider, in the progress of the case if not now, some of the objections that are made to the redress of all these mischiefs, if they be mischiefs, by the authority of the court.

Before undertaking to point out the operation of this final structure and its employment as an infringement of the cession of the street and its rights to the inhabitant, I want to direct your Honor's attention to what must be now considered, to wit, the necessary attendants in regard to the motive power, the length and frequency of trains, the speed, the immediate start and immediate arrest of this train, to answer the needs of rapid transit.

Everybody is in favor, of course, of rapid transit. Nothing would be more satisfactory than that perfect system of rapid transit which modern civilization has never been able to obtain, to wit, the opening of a carpet, seating one's self upon it and wishing to be transferred to Mecca, or perhaps somewhere else. *That* is the rapid transit of imagination and of newspaper discussions. Everybody is in favor of rapid transit. The annihilation of time and space is necessarily popular compared with the slow impediments and vexations of any present actual use. But when the efforts and attendants of rapid transit are compared with this brilliant imagination, of course the railroad is nowhere in comparison. But the problem of rapid transit cannot be answered by mere tables and schemes, by mere contracts for structure and promises for the making of motive power.

The inexorable condition of rapid transit, then, through a crowded city, in order to meet public expectation and justify the intervention of the State by its paramount power, are to be taken into account in the consideration of this scheme. The apparatus which is now sensibly before your Honor's eye represents the general nature and the form of this structure. Let us see what the motive power must be expected to accomplish if it meets the requirements of the transfer of our population that is expected from it. It is not a train that is to run without stopping from the city of New York to some terminus beyond the city. It is not to have by any possibility the methods and the trial, or the standard of success, that belongs, for instance, to the wonderful effort and the completed effort by which a tran-

sit across the continent is effected from New York to San Francisco, at near fifty miles an hour, by which, with infrequent stoppages, this immense span of the continent in three days and a half is effected. The conditions are very frequent trains, very capacious trains, very powerful engines, the most powerful that the experience of the manufacture and use of this motive power has ever produced; frequent stoppages, which involve, of course, great capacity of suddenly attaining a considerable speed, and suddenly retarding it for the safety of the stoppage, and that shall induce a general rate of travel. These hindrances and interruptions are to be considered in regard to the rapid movement of the trains. Now, these inexorable conditions by which rapid transit (not merely as an experiment, but as something which is to meet the actual requirements of our population) is to be accomplished cannot be avoided. What do they require? Why, the firmest possible structure, greatest possible provision against accidents or dangers, and the limitation of possible accident and danger thereby incurred so far as the resources and invention of man and the nature of matter will permit. The frequency of trains, and their weight, cannot be dispensed with. Why, this elevated railroad which has been now in operation for several years up Greenwich street, transfers, I am told, only about 6,000 passengers a day, and this railroad of the Sixth avenue company transfers 50,000 every day in the year, on an average—55,000 or 60,000 per day. So your Honor will see at once what an immense reduction of the imaginary power of the steam railroad is induced by this requirement. But *that* is slow, *that* is feeble, *that* is not capable of carrying at great speed and with great power heavy trains of passengers. It cannot meet the demands of the transfer of thirty to fifty and sixty millions of passengers a year. But, as I say, this rapid transit—if it is to meet public expectation and public need, must have some competency to perform the great services and labor that is to be imposed upon it. Now, the experience of steam transit through the great city of London—tried both by underground and upon elevated tracks strongly supported by mason-work, with heavy and frequent trains, with repeated stopping, and carrying in the aggregate great numbers of people—is that they can be accommodated upon suitable structures; but they are structures that contain as a necessary and fundamental basis of their success, the firmest beds and the absolute exclusions of all interrup-

tions. And I am told that the immense demand of power in the engines has been such as would have been adequately served by no contrivance of a road-bed that was not of the *firmest* kind, and that was not in the very rail itself of the *firmest* texture that it is in the power of the art of working iron to produce in the form of steel. That engines of 30 tons are necessary to combine the immense power that, on a sudden start, shall attain rapid speed, and then after a sudden stop shall admit of a resumption of speed; and that the success of underground railroads there is found in the firmness of the road-bed and its seclusion, and in the use and employment of these immense engines that, with stoppages at intervals of half a mile, can attain an intermediate speed of 30 miles an hour. They cannot make up that average because the slow acceleration of speed at the start reduces it; but they must get somewhere, during some part of their course, rapidity, or else these conditions of stopping and starting will prevent its being a rapid transit. Now, we are not to take a road as an imaginary road, and discuss, before your Honor, the question whether the road as operated for the purpose of rapid transit is or is not compatible with our use of the surface track—with the public use of these side lanes, or with the occupancy of the houses on the sides of the street which will be affected by the noise and tremor that must attend the constant presence of this powerful enginery in operation. But we are to judge of whether it is or it is not compatible with the trust use of the streets of the city of New York, as they are and have been and ought to be used; and the sole title of which is that vested in the city. Now, these cars of our road (which are certainly not too capacious and are not too numerous for the public need, as your Honor knows) reach in their extension just about from one post to another. The accurate measurement, I am told, shows that the cars are 25 feet, and the horses are 10 feet, which is 35 feet. The cars are accurate in dimensions; the horses, perhaps, are not, and the frequency with which the cars run both ways your Honor has every day observed. You can see, then, how much this middle track has taken from the public use, not by our use, but by its being excluded from being traversed by the public, except at right lines between these posts. Then your Honor can see how ordinary vehicles, trucks, drays and heavy wagons, with heavy weights for their loads, are to be impeded—unquestionably impeded in

crossing this street. Your Honor will see how every cross street is divided here by the posts—necessarily divided. The requirement of the structure is that it shall be in the middle of each road, and not otherwise; and, then, here is an illustration of what certainly is a very important subject of interest to the people of this city, not only to those that live on this avenue, but that live in sections where the Fire Department needs to bring its apparatus rapidly and securely to their aid. Here is a truck actually and properly measured, of the length of 50 feet (which is the length of the ladders of a fire company, irrespective of the team of horses), and if anybody can contrive how that fire apparatus going down this street could round and go down that lane, he is wiser than the ingenious and competent mathematicians who have made this calculation. Even if the horses are as tractable and docile as our learned friends would have us believe they are, I submit to your Honor that it would scarcely be possible to get that truck down that street in that way. A direct crossing is impossible; if there was a fire on *that* side of the avenue and there was need for the fire apparatus, the only way it could get round would be to go down to the Battery and come up on the other side. If there was a fire on *this* side the Fire Department could get along possibly, if the horses were tractable and the apparatus was not smashed before it got to the fire. And yet, in the most *soothing manner in the world*, this structure is spoken of as only an interruption while it is being completed, and that afterwards all things will be as *smooth* and *easy* and *open* and *manageable* and ENJOYABLE as they were before it was commenced. Now, I come, if your Honor please, up to the silent and stubborn interference of this apparatus *with*,—and—its—impression—*upon*, the proprietary occupation—of the side of the streets, upon the use of the streets in these lanes on each side, and upon the use of this horse railroad track of our company, and on the passage of carriages and drays, and all the manifold forms of traffic in this great community, while these trains are moving. If they are to carry the travel that they promise, if they are to relieve the distress about which so much complaint is made, they are to have very frequent trains, and they are to have very heavy trains—for both frequent trains and heavy trains must combine to carry the mass of population. If they make them less frequent they must be more heavy; if they make them more *heavy*, then they are not capable of rapid

transit, because there is not power enough to move them or power enough to stop them; and, so, you must have a limit reached both in respect to length of the trains and to their speed. That is the best result from those two factors for the most rapid possible transit of the largest number of people. Now, if your Honor please, the engines that are to be capable of this immense demand upon their strength must have open throats; they must have smoke and fire and noise constant as are the moments of the day. There is nothing can be devised to do away with all the impressions made by steam trains of cars going at great speed through a great city. And when we are considering whether or no injury is threatened or injury is effected, and so determining whether it is within the use of the street for the purpose that it has been used before, we are not for a moment to limit ourselves to this dead structure, but to this structure as a *part* of, and justifiably only as a *part* of, and deemed only as a *part of*, this most active and most constant enginery of motive power. Well, now, our bill has sufficiently set forth what is at once visible to the eye, or what the least reflection brings to the mind, that the population we are now accommodating by our cars cannot, with safety to themselves, seek this mode of transit; if it be necessary to add to the present methods—always inadequate, no matter what additions shall be made to them, for the transfer of people up and down this island—why add it in a way that will be an addition, and not necessarily a greater subtraction from the present useful and improved methods of traffic and travel. These cars pass one another, being restricted perhaps as to the distance between the tracks, so that as a matter of rule passengers are not allowed to get off from the cars when they stop, on the side of the car next to the parallel track, on account of the danger and the exposure. And if I am not mistaken, this court has held judicially in a case seeking redress for injury, that it is carelessness on the part of the passenger to get off from one of these cars on the inner track, and that it is contributory negligence on his part that prevents a recovery for injury from the collision or wounds that attend his experiment. Now, if it is said that we should not complain of having posts set on the outside of our track that will make necessarily the same danger on the outside of our track that exists on the inside because we have that danger on the inside, and therefore it is no harm for us to

have it on the outside also. Well, that would be like saying that if the occupant of a house ran the risk of breaking his neck by means of his back-door, and had been obliged to close it up, that therefore he ought not to object to having a pitfall dug in front of his *front* door, because he was always exposed to the danger at the other escape. It is because of the necessary limitation in our occupation of this street that brings our tracks so near together and that makes it dangerous by the regular passage of our cars, to use that mode of exit from the cars, that this obstruction, creating the same and greater danger on this side of our track, becomes absolutely intolerable. It is closing up the use of our mode of traffic in passengers, both for our own emolument and for the public use, by such a constriction of circumstances as makes it dangerous of necessity. Now, that being so, you see at once that the occupation of the sides of this street, for the purposes which require the resort of customers for trade and of the enjoyment of domestic homes, is all gone the moment that this enginery is set at work. But, when I call your Honor's attention to the other requirement of rapid transit, to wit, *reasonable safety*, you will see that it is utterly incompatible with this structure. Why, if your Honor please, no structure is firm that is not supported by the solid earth, and no structure that is not supported by the solid earth and resting upon it, is at all compatible with the use of a powerful enginery and the jar of constant traffic. They say there is a condition for the test and for the measurement somewhere of the supporting power of this track, which is to be 2,000 pounds to the foot. But, what is the supporting power of the structure if the immense weight is enhanced by the constant momentum of the rapid hammering of the engine? How can these structures exist? I speak now not so definitely of the dangers to those that use them, but of the danger to the people of the city in the midst of whom they are used: and the danger to our cars: and the danger to our horses: and the danger to the traffic in these narrow lanes and on these sidewalks: and of the danger to these buildings. Who is to give a guaranty against the danger that is liable to arise from railroad traffic under circumstances that make it impossible to observe the precautions and moderations that always attend a temporary use of the trestle work on a railroad? Why, neither your Honor, nor any of the rest of us, has ever traveled upon a steam railroad

having, as a part of its structure, a trestle, that he did not find that the engine in approaching the trestle work slackened its speed, for the hammering of the engine would destroy the framework over which it passed. And there never is a moment from the time the passenger-car reaches the trestle work until it leaves it, that every passenger does not consider it a temporary danger, tolerable and tolerated only because it is *temporary*, and only because those precautions are taken that makes even an imagination of security possible. And, are they to adopt that system? Are they to go slow and sure and quiet over this trestle work? Why, then they lag behind the street cars beneath them: and rapid transit turns into as great a caricature of what the public imagination has affixed to its premises, as Dr. Franklin's description of a sleigh ride. A nearer illustration of the power and service to be expected from a steam railroad, to accomplish such a rapid transit through the city, than any other, may be found in the experience of the railroad avenue, which brings the steam traffic together of three important railroads. The whole passenger traffic of the Hudson River, and New York Central Railroad, and the Harlem Railroad, and the New Haven Railroad—the whole transfer of passengers in a year, on these railroads, including all kinds of passengers, way and through, is only about three millions and half. And with reference to the transportation of passengers down that avenue this side of Harlem river, why, there has been, perhaps, no strictly accurate estimate made. Yet I am assured by competent authority that an estimate of three millions would be a safe one, as the nominal burden of the railroad passengers carried by the united trains of those three railroads coming into the city through Fourth avenue to Forty-second street—that that would represent the annual burden of the transfer of passengers down that avenue. Your Honor will see that this is about 10,000 a day. Now this road is to accomplish on trestle work and with a double track—a transfer that is to approach somewhat at least the burden of one of these street railroads. Now, how much of an interference with safety and with occupation did that steam railroad work in the upper part of this island or such use of it below Forty-second street as was tolerated down to Thirtieth street. And what effect did that produce upon the occupation of the abutting lots? Why, the population was driven away from it, and *kept* away from it by these dangers and by these

disturbances. Property, for occupation, was sacrificed, and the region turned into a waste. And it was only when that road—not up in the air, not on a trestle work, but confined in a deep gully, was arched over, that people would live in the neighborhood. And then they had to banish steam entirely from the overarched tunnel, and when the excitement growing out of the presence of these dangers arose, the population demanded that this instrument of danger and terror should be disabled, and the city was induced to contribute three millions as half of the expenses of making steam transit tolerable on an avenue of this city. And now, if in the case of this steam road, with the advantage of a firm bed on the earth's surface, these dangers were so great in the partially unpeopled and untraveled regions traversed by these steam trains as to cause them to be removed, simply to avoid collisions on the surface, your Honor will see that there is not a single other danger to life, or a single other disturbance of the comfort of life, that is not intensified tenfold by *mounting this enginery on stilts.* The danger and the solicitude about danger is increased tenfold by this elevated traffic, and in all the indirect injuries to life and the disturbance of its comfort. The comfort of passengers both on that road and on our road, all the pleasure traffic, all the stopping and all the resorts of comfort and of convenience and profit, *all* that makes up the object of having a street and having a city, is all sacrificed *pro tanto* to the convenience of people that live out of the city, and want to get into it, or who live *in* the city and want to get out of it. How would it be if all the streets of this city and *all* the avenues of the city were occupied by this trestle work and ravaged by the constant operations of this enginery.

You would desolate the city in order to make it convenient to its inhabitants. You would make it unsuitable to both for resort and for occupation, in order that it might be easily accessible. Such is the monstrous and underlying contrivance by which popular necessities and demands are set up and made the means, not of public convenience, but of private speculation. It will answer to make profit out of the imaginations of men, and then leave the enjoyment of it to the benefit of whom it may concern. Now, I think I have said enough to your Honor to make it quite apparent that unless some power beyond the natural right of the citizen has authorized this intrusion, every citizen has a right to destroy it, and by strong

reasons, to invoke judicial aid to suppress it. I have shown to your Honor that under the Act of the Legislature of the State of New York, that determines the conditions upon which it should be possible to traverse these streets, there is accorded to this corporation, and has been tolerated, nothing of this kind. And now I proceed to consider and examine what is the imaginary support in point of law, and how it conveyed to this Gilbert Elevated Railway the authority to complete a structure of this kind in the city.

It is quite apparent that if the Legislature of the State of New York, after the passage of the amendment to the Constitution, had undertaken, under the guise of amending the charter of this road, to change the structure, and the faculty of making a sham road 14 feet high, and upon a support of this kind; by posts in the middle of the street, and to permit that without the consent of a majority of the property owners, or without the substitute that the Constitution allowed in case of a failure to obtain that consent; that the *act would have been void;* because it would have been making an entirely new road from the date of the new enactment and *dispensing with the authority from the residents which was required.* I think no court will support that circumvention of a grave and well-considered constitutional intervention to protect private rights and private interests, allowing the mere shred of an existing statute to be contrived, and all the powers and all the faculties and all the inducements and all the conditions which rendered it possible in the original enactment to be now exercised, notwithstanding that Constitution. I have never found courts inclined to stick at the letter of the Constitution and subvert—I do not say its spirit, for I am not a stickler for the spirit of the Constitution, as against its true meaning, or as against the meaning of its language—but its *plain construction* and its *obvious intent* to prevent this mischief, and its obvious purpose to stop this encroachment upon the private rights of the people of this city, at least where it stood when that clause of the Constitution was passed. I find no legislation that has undertaken to amend the charter of this Gilbert Elevated Railway, and to make that possible which was not possible before, and now I find the sole authority in the alleged permissibility, by a construction of a certain section of what is supposed to be a general act, to accomplish what a general act could not accomplish, if it had been framed in that design. For it is

admitted upon the pleadings that this railroad that proposes to go into the Sixth avenue and erect this structure and operate it, has never had the consent of a majority of the abbutting proprietors, and has never had the action of the Supreme Court in the substitute for that consent which is provided by the statute.

Now, let us see first the act itself, and question it on its face, on its constitutionality, and then on its construction as admitting of this strange invasion, in derision of the Constitution, and of the rights of all the owners of property, which is sought to be practiced for private gain and private emolument, and is to be sustained by all the learning and all the ingenuity which our bar can furnish. What is it to do on its face? It is seeking to build this road without asking the consent of the abutting proprietors or appealing to the Supreme Court for the substitution for the consent of such owners, as is provided by the statute. It is asking to do it under an act passed since the constitutional clause was adopted and under an act that has not undertaken in terms to do what it is here sought to be accomplished, and which would have been wholly repugnant to the constitutional law. Let us see whether we are indeed such sticklers for the phrases of the law. Now, my first challenge of this act—and upon that theory this case is to be tried—is that it is on its face non-constitutional because it does provide for special charters. It is admitted, I suppose, that a law creating a special charter for any set of people to lay railroad tracks or have any special privileges would be unconstitutional, irrespective now of the subordinate question of the conditions of consent which I have spoken of. Now, your Honor will need to look at this act to see what its nature is. The first five sections are occupied with the system by which there may come into being certain specially defined and described corporations that may build certain specified and defined railroads on certain specified and defined conditions, and with the necessary powers. A greater part of the statute, therefore, is occupied with what constitutes the statement of all corporation acts that require the condemnation of property, etc., and contain nothing of importance relative to the question. I now have to consider the 36th section. This is the section that will probably need to be considered in discussing the construction of the act as supporting or authorizing the proceeding that this Gilbert Elevated Railroad Com-

pany is undertaken to begin and complete, and has no particular relation to the general question of the validity of this act which I am now presenting to your Honor.

It is a matter of primary intelligence that the Legislature of this State cannot devolve legislative power upon a subordinate department of the State or upon the people of the State except by some constitutional provision to that end. All that, in its nature, belongs to legislative power is by the Constitution vested in the Legislature composed of the Senate and the House, and all that can ever become legislation in this State must become so by the action of the Legislature, and, to be valid, it must be submissive and conform to the general constitutional requirements either in the manner of its action or in respects that the Constitution requires. Now, the Legislature, in respect to this subject, could only pass a general law on the matter of railroads and of railroad tracks and special privileges, and whatever came from the legislative power must be thereby opened to the citizens. The citizens are the subjects of the law-making power. The Legislatures are the sole depositaries of the law-making power. Whatever takes effect as law must be complete when it leaves the Legislature. Whatever is binding upon the subjects of law, the people, is complete in its force when the legislation is enacted, and when the Constitution says that the Legislature shall pass only general banking laws or general railroad laws, or general laws on any of the manifold general topics of right that may be enjoyed or franchises that may be accorded, it means that when the law leaves the Legislature there is no co-operating power, and no intermediation between the governor and the governed, but the law has been laid down which the people in their general and individual rights equally are to find a place for themselves under, in their own voluntary and accorded action. This is what a general law means, and the mischief is which has been perhaps too much recognized (perhaps we have gone too far) that special relations by governmental authority, with particular citizens, shall not come to be accepted under the general action of the Legislature which permits general action by the citizens in their primary and individual relations. What other definition do you find? A general law on any subject must be such as within the range of that subject opens by the law to the citizens without their intervention *an opportunity to avail themselves of it*. In other words, to come under the law by their

rights as citizens, accorded by the law. Now, there being a constitutional clause which prohibits the Legislature from giving a special charter with special clauses with deliberate and considered adjustments and arrangements to particular circumstances and things, and requiring that the law shall be general, and not thus accommodated and adjusted to particular instances and interests, if the Legislature should pass a general law either on the subject of banking or of railroads or of insurance companies, that a commission should be created, that at its discretion should accord special charters on any of these subjects according as upon inquiry they should find right and just, would, or would not, that be a law which satisfied the requirements of the Constitution that they should pass only general laws. It could only be so by assuming that the Legislature had devolved the passage of special charters upon other authority and did not exercise it itself. But our Constitution does not permit legislative commissions any more than it permits (and nobody ever claimed that it did permit legislative commissions) the Legislature to leave it to the people themselves to say whether such and such a thing shall be done.

Now, let us look at this law. What would be a special charter? Where would be the designation? To what would it be applied? Why, it would be as to how much stock it should have, as to what conditions and terms, as to what kind of specified modes and as to what should be the acceptance of this or that application, and the power, upon scrutiny, to determine whether or not it should be accepted. And now, with these general remarks, let us look at this statute. The general railroad act (which your honor is sufficiently familiar with as with other general legislation) provides that any number of citizens by doing so and so, by doing what that statute requires, shall have the right to do what that statute *allows*. It is not a special accord of franchises, it is the opening of common rights of what before was the subject of special franchises, and which under the old system could have been communicated only by special authority. Now, this provides that "whenever it shall appear by the application of fifty reputable householders, etc.," that there is need in any county of a steam railway, or railways, for the transportation of passengers, etc., * * the Board of Supervisors of said county may appoint five commissioners, who shall be residents of the said county, and who shall have full power and authority to do and provide all

that they are hereinafter directed to do and provide," and then is designated the functions which devolve upon them: They are to give bonds; they are to meet. Now, what are they to do: "Said commissioners shall, within thirty days after such organization, determine upon the necessity of such steam railway or railways," that is a *specified* steam railway or railways, "and if they find such railway or railways to be necessary in such county," there is the function of determining whether a *special* road in a *special* place for a *special* need and for a *special* purpose shall or shall not by governmental power come into exercise and play. And what is that but a Legislature passing a *special* charter? What else is it but a Legislature saying that in such and such a place, and of such a length, and for such time, there shall be a railroad built. And now this generality is satisfied by devolving upon a governmental commission the power of a Legislature to make a special charter. Then it says they are to "fix and determine the route or routes," that is, to have exclusive power to locate the route or routes of such railway or railways *over*, *under*, *through* or *across*, the streets, avenues, places or lands in such county, "except certain streets of this city, and certain other places." Now, look at the general railroad act. It is no longer a special right, it is no longer a special franchise; it is made a common right of the people of this State to build railroads, the same as it is to *sell groceries*. *That* is what is meant by a general law. It is the right to do what is permitted on the conditions that are named by the Legislature, and which is made a matter of general and common right.

The 4th section proceeds to repeat the constitutional requirements of the consent of the proprietors on the road, or the action of the Supreme Court in lieu of such consent.

The 5th section provides that the said commissioners having by such public notice as they may deem most proper and effective under such conditions, and with such inducements as to them may seem most expedient" (*all a matter of governmental power wholly in their discretion*) invited the submission of plans for the construction and operation of such railway or railways, the said commissioners shall meet at a place and decide upon the plan or plans for the construction of the particular road that they have fixed upon and in the locations determined by them. What more could there be in a *special legislative charter than that very thing*, determining whether there

shall be a particular road, *determining* the special conditions on which people should be allowed to build that very road, in that very place.

Where is the wisdom of the great lawyers of the Legislature that, though they could circumvent the will of the people of this State, and avoid making a private charter by giving five men the means and the power of making private charters as they saw fit? The 6th section goes on to provide that the said commissioners shall, within the like period of ninety days, fix and determine the time within which such railway or railways shall be constructed and ready for operation together with the maximum rates to be paid for transportation and conveyance over such railway or railways, and the hours during which special cars or trains shall be run at reduced rates of fare. They shall also fix and determine the amount of capital stock of the company to be formed for the purpose of constructing, maintaining and operating such railway or railways; and the number of shares into which such capital stock shall be divided, and the percentage thereof to be paid in cash on subscribing for such shares. What would there be in a *special charter* passed by the Legislature, but this very thing that I have here indicated, to wit: that on certain terms, *not general, not common*, not *prescribed by a general law*, a *particular* railroad, in a *particular* place, of a *particular* amount of capital, of a *particular* number of shares of stock, of a *particular* rate of speed, of *particular* fares, shall come into existence by a vote of five commissioners. Do they execute, in a mere ministerial relation, the free and declared will of the Legislature? *No;* the free and declared will of the Legislature is that the commissioners shall fix all these things to satisfy themselves. There was no measure or scope or degree of legislative discretion that before this constitutional amendment resided in the Legislature, that is not by this act conveyed to five commissioners. Is it, then, set forth a general law that the citizens of this State find openings to them the right as citizens to do *this*, *that* and the *other thing?* No; nothing but a power to an intermediate sovereignty to lay down special laws for particular sections. Now, if the constitutional amendment can admit of as great freedom as if it did not exist; all you have that makes the state of things worse than if you had no constitution at all is, *that you must violate common sense and common justice to get rid of the Constitution.*

The 7th section provides that the said commissioners shall prepare appropriate articles of association.

What under heaven is that but drawing a special charter? Is it citizens making their charter within the range that the Legislature has allowed by a general charter? *Not at all*; its governmental faculty and function is to draw a special charter which the Legislature could not possibly do, "in which said articles of association shall be set forth and embodied as component parts thereof, the several conditions, requirements and particulars by said commissioners determined, pursuant to sections 4, 5 and 6 of this act, and which further shall provide for the release and forfeiture." One would think that the terms upon which this special charter was to be forfeited in a particular case was a matter specially arranged for the accommodation of *that case* and *not subordinating them to a common right.*

Then it goes on to say that they shall forfeit all rights and franchises acquired by such corporation in case such railway or railways shall not be completed within the time and upon the conditions therein provided. Then they shall open books; then there is the election of directors, and then a certificate is given, and *then the special corporation is made.* Did it make itself under a general law? I think not. Did the *Legislature* make it? They *could* not. *That is the only reason.* What they *did,* they did through the Legislature; but it was not governmental action. And if there was any virtue in what the commissioners *did* in the way of governmental authority or in the exercise of governmental discretion, they did it because the Legislature *could do it.* If the Legislature could *not* have done it, it could not depute the power to the commissioners. You cannot have a ministerial relation intervening between the declared power given by the Legislature and the people, to whom the power is given by special charter or by general law; but this framework is a *devolution* upon this *commission of five* of the whole question whether there shall be a railroad, *where* it shall be, *what* it shall be, *how* it shall be restricted, *how* it shall be governed, *what* its stock shall be, *what* the expression of its charter shall be, and from that and the authentications of that action springs into existence a charter made by government and *not* by the corporators, and *not* by common right. I am sure, if your Honor please (with great respect to the ingenious minds that can contrive this legislation) that it would not have been in that shape if that clause of the Constitution

had not been made. Nobody ever saw such a *monstrous desertion of legislative responsibility* until this fundamental clause required that there should be no special legislation on the subject. And they satisfied themselves, therefore, with giving a general legislative partition of powers—*not* of the right of citizens to conform to a general law, *but* of legislative power to certain commissioners appointed *by* government and *for* government, to *determine*, *arrange*, *accord* and *express* all that makes up the *private* privileges and the *private* charter of a particular corporation. You would have as many different rights in these corporations as you have commissioners. Now *one* thing, and now *another*. *One* thing in Buffalo, and *another* thing in New York; *one* thing in *Troy*, and another in *John Brown's Tract*. Under a generality you have found out the foundations of making corporations, and have *broken down your Constitution*, if this can stand as a power that it is lawful for the Legislature to devolve.

Another general constitutional objection is, that in the operation of this act (it is created by valid enactment so far as the question is between the State and the right of the Gilbert Elevated Railroad to put its road over this road of ours) that it is an act of the Legislature which violates the contract made between the city of New York and the Sixth Avenue Railroad Company, and that there is no reservation of authority anywhere that justifies such a violation. What I have said in explaining the practical and material features of this structure in its operation will enable your Honor to see whether or no it is a violation of the contract which is accorded to this company by the instrument executed between the city and this company plaintiffs, and sanctioned by the city. Supposing there were no execution of a power reserved to alter the charter of the railroad company running from Albany to Buffalo, and it was a contract protected by the Constitution of the United States (under the Dartmouth College case), would it or *not* be a violation of that contract to allow, fourteen feet above that road and on its bed, the building of a trestle work and the running of a railroad on its track, *over* its bridges, *on the ground* that it did not interfere with the surface railroad, and only used what had been accorded to the surface railroad for surface purposes, *to prop up an air-line railroad fourteen feet above the track?* I think that would be a violation of the Constitution, and it will be for our learned friends to point out why it is not a violation of

the contract of the city with us, for the State to authorize such a transaction as this.

I now come to the consideration of the construction of this act. Supposing it to be valid under the Constitution, and supposing that certain powers and rights may be communicated by the action of this Board of Commissioners to railroad corporations that may spring into existence by virtue of that act, and derive their powers under it, and have no limitation, except what is accorded to the discretion of the legislative board; supposing *all that*, how does the Gilbert Elevated Railroad Company come within the movement of this general statute, so as to get, not only a road, but to get a road free from all the substantial guarantees of private right and of public convenience that are affixed upon that statute by the Legislature. If this act had in view objects which, in good faith and in a public sense, could be desirably accomplished to suit the public need, in the city of New York, of a railroad that should have the energy and the rapidity of motion for its trains that would make the rapid transit and transfer of great masses of people to serve the public need, the *place* where it should be, and the scheme on which it should be possible and available and safe, were all left open to the discretion of the public and to public discussion; with no conditions, except what would accomplish a structure operated consistently with the existence and the preservation of the necessary interests of the city of New York, and would also meet the occasion of its population for rapid transfer, back and forth. Now, undoubtedly, the Legislature knew that this immense problem could not be solved by make-shift means, nor without great cost, and the question was whether it could be done *at all*, or done for a cost that, in the practical eyes of the people, was equivalent to its *permitting it to be done at all*. But, the question was not whether something could be done that was *not* rapid transit, and was *not* safe, and was *not* consistent with common right, and was *not* consistent with the main objects by which population was concentrated here. *That* was not the proposition. But, it would cost a great deal of money; and there was a provision for rapid transit from Forty-second street upward, in a safe, firm, secure way, which was accomplished at great public cost, as well as the expenditure of private capital. There needed, only, to supply the space between the business centres of the city and this railway. The conditions, necessa-

rily and primarily, were that it should be *straight;* that it should be *safe*; that it should be *short*; and that it should be *consistent with the rights*, and should meet the demands, of the *people*—the paramount and controlling lawgivers of the whole transaction. Why, the reports of the commissioners say that they were shut up; shut up to what? Why; shut up to making such a charter, and giving such a road as these people demanded and prescribed for themselves. And now, how is it with the scheme which might have given us rapid transit by taking an avenue, and at a sunken or elevated grade, shall be safe, firm and strong, and free from injury to anybody else, and at an expense that that system would involve. *How is it avoided?* It would cost $5,000,000 to build such a road, we are told, from the City Hall to Forty-second street, and then, *it would be done for all time*, and then, *all the conflicting interests, and the general desires would be satisfied*, so far as the inexorable limits of human affairs will permit. But, the men that build *that* road would have to take the $5,000,000 out of their own pocket. Now, it is demonstrable by the experience of elevated railroads, in their limited interference with partially unimportant property, and population, in the sense I am alluding to now, *that they degrade property from* 25 *to* 30 *per cent.*, 50 *per cent.*, 60 *per cent.* Isn't *that taking somebody's property to build the rapid transit road.* It is not taking property from the men who build it and get the emoluments, *but it is taking the property of others*, and so this very avenue, growing constantly in value, and placed almost at the head of the shopping avenues of this city, is really to suffer the degradation of property that cannot be put lower than $25,000,000 or $30,000,000, taken out of the pockets of our citizens, and not accomplishing a public service, by a special charter or legislation. Why, if your Honor please, all these habitations of men, after this road is built, will present the same relative aspect that the naked boughs and empty birds' nests in winter do, to the foliage and the soul of summer; all threatened by *this monstrous invasion of private rights.*

Now, "what did they do?" They laid out a route that, in their discretion, they thought would meet the exigencies of the public, and which would be short and straight, and safe and suitable. What was that route?

You must assume that they laid out a route. They could not lay out a route that was prohibited by the act, I suppose.

I should think they could not; and what does the act say as to their power in laying out a route? Section 4. "The Commissioners shall have exclusive power to locate the route or routes, except between Third avenue and Sixth avenue, or across any of the public parks—that is, all over the city of New York, except *in Broadway, and on Fifth avenue, below Fifty-ninth street*, and Fourth avenue in Forty-second street, in the city of New York. Their powers were taken out, from laying out a route that crossed Broadway; *that they could not do.* This route crosses Broadway. How will they get out of it? If they say that they laid out a route, and this is the route, *it is void.* If they did not lay out a route, *there is no power to build any road upon it.* There is a provision, in the 36th section, to which I now ask your Honor's attention. When these routes were laid out under the law, something might be found to exist in respect of right and privilege under previous legislation. "Whenever a route or routes determined upon by said commissioners coincide with the route or routes covered by the charter of an existing corporation, formed for the purpose provided for by this act, providing such corporation, &c., such corporation shall have a "like power" to construct and operate such railroad or railroads, upon the fulfillment of the requirements and conditions imposed by such commissioners as a corporation especially formed under this act." Finally, the Legislature concludes, giving them power to go upon any route or routes with which they may connect, that is, on their own routes with these new routes that are laid out, "but subject to the requirements as to the connection and conditions, and section 18th of article 3d of the Constitution of this State."

Now, the point is, that a route laid out lawfully, and opened to the corporation specially founded under this act, whenever that by the power of this commission has been brought into existence, then if there is another road, another corporation that has a route coincident with that lawful route, it shall use that lawful route just as these commissioners might have authorized a special corporation. Then, what was the route that this commission elects, and that this road, by coinciding with it, is allowed to use? It was a route that crossed Broadway in two places. Could a specially formed corporation, coming into existence by power of those commissioners, have built on a route that crossed Broadway? *It is excepted from the very granting power of the discretion and authority.* The

scope and area of legislative faculties accorded to these commissioners "excepts" that they shall not be able to authorize a route *over, under, through or across Broadway.* Now, we have another of those interesting conditions which a corporation that *has not any power of its own can come into.* It can repeal the requirements of getting consent from the landowners, *repeal* the condition of the Supreme Court's inspection; *repeal* the exception of crossing Broadway, which *all the power* conferred by that law as an original creation, *could not have vested in anybody;* and *all that* grows out of their being under a coincidence found between a route that had been given to somebody else, and a route in the discretion of these commissioners allowed to be built under this act. Had these commissioners laid out a route "over" and "across" Broadway, then it is void; a coincidence with a *void route* would not accomplish a *result of coincidence with a route that was legal.* So it seems that this route could not be "*coincident with,*" because *it could not exist in point of law,* and on that ground the justification set up by authority under this act to build this road in this route—for it is only as this route, and as a part of this route, and as an accomplishment of rapid transit to the complete extent and course of the projected road, *that it is justified at all,* or can come in by virtue of this act; nor can this Gilbert road get itself into a position to proceed with the inquiry whether it can build the kind of road that it is proposed to build under the provision of the 36th section which I am considering; *but it could not build upon this route at all* by any authority of any commission, because *this route could not exist under that statute.*

Now, we come to a more intimate consideration of the 36th section.

Supposing the route to be a lawful one, and therefore the predicament of coincidence being established in favor of this Gilbert road, it is within the power of commission to build a road. What kind of a road could it build? Its charter road it is not *attempting* to build; it is not *pretending* to build. *That* I have already sufficiently explained. Now, the Legislature having never allowed it to alter its *kind of road* under the clause which is said to give, on a coincidence of route, a right to a chartered road, if it could build a road that its charter permitted on that route, can they, by coinciding with the route, build a road different from what their charter allows? Is it a modification of their charter? Is it changing their faculty from

being a pneumatic road on arches that span the roadway from curb to curb and are fifty feet apart? Under that coinciding of route is this a change of their charter so that they get corporate functions to do what they could not do? *No.* Now, in the 36th section only these existing corporate routes could display themselves on a route subject to such conditions of displaying themselves within that charter as these commissioners should invoke. *Was there accorded to these commissioners the legislative power of altering the charter of the Gilbert road at the commissioners' discretion?* Then it was void. No; it was simple and straightforward as can be. You may find that there are existing chartered possibilities of building a road according to the charter or routes that you are taking up for your especially authorized railways. You can let them in to build their chartered road on such conditions as you find suitable. *Not to build a road* such as you enacted for them, and enabled them to build, and *their charter has not enabled them to build.* Not by any means. Why could not these commissioners, on this coincident route, have allowed these people to build this pneumatic road? The people, I suppose, do not want them to build it because it was as harmless a road, after the Legislature had permitted it to be constructed, as it was while it reposed in the inventive mind of the projector. Nobody had ever evinced a desire to pay a dollar of good money for a pneumatic road 40 feet in the air. Then the Gilbert road could not build a railroad here; and then the commissioners undertook to say, you cannot build your railroad here, but we will let you build a road that becomes possible only by our legislative discretion, and *possible* only by the statute of 1875, and *possible* only by getting consent, or in lieu of it, the allowance of the Supreme Court. We will permit you to build such a road as there is *inducement to build*, and alter your charter to give you the power to build it.

Their charter is *not* altered. If it *is* altered, who alters it? Is it not therefore a private special piece of legislation *in altering the charter of the Gilbert Railroad Company?* Where could it find its place within any general law under our constitutional provision which prohibited a discretion? It cannot even be repealed or modified under the existing statute now, without stating the part that you repealed, and the part that you modified, as modified. And all this is done subservient to an una-

credited legislative power, which *transcends all the power that in the Legislature possibly exists.*

But, suppose they could alter the charter of the Gilbert road, or that the charter of the Gilbert road *is* altered, so that instead of a pneumatic enclosed arch-supported track, this structure fourteen feet high, alone, propelled by steam, and not by pneumatic power, is justified.

What was the authority attempted to be conferred by this section on a discretionary intrusion of an existing road on the property, that would not be possible for other corporations created here? What does that mean? What are the conditions? Of course, the condition upon which alone the newly organized special corporation springs into existence under this act, to do the work proposed, to wit: getting the consent of the proprietors, or in lieu of it, the sanction of commissioners appointed by the Supreme Court; and yet, no word has been heard of that the consent has been obtained, and they actually stand here in your Honor's court, and on the pavements of that great avenue of the city of New York, and claim to do what no special act empowering them before the constitutional enactment had given them the *power* to do; and no special act could give them the *power to do* after the enactment of that constitutional clause which no special law could give them the *power* to do, and no general law could give them the *power to do*, what no general law is *pretending to give them power to do;* and any transaction that owes efficacy to its authority is *post hoc* to its date; and this alteration of its power assuming to do what no body of authorized people, legislature or courts, *can sanction for a moment* as compatible with the public intention of the law. No one pretends that it is a creation of Omnipotence. *Ex nihilo nihil fit*, is supposed to be the limitation of means, and it is supposed that if there is an affluence of power everything is created under a miracle. Now, all this is created out of nothing, but from authorities that are utterly incapable of the energy to create. This piecemeal lapping of statutes is made to accomplish what no infractor of complete legislative power now in existence in this State could accomplish, and accomplishes it as of a date subsequent to this act of the people limiting the Legislature by a special amendment and not in existence before. Now, if the court please, these are the general views of the law, and if they find acceptance with you they dispose of the subordinate amendments; but if it reaches that stage of

the discussion as to the recent constitutional amendment, as construable to the end now sought to be accomplished under its authority, then you are brought back beyond that question I have adverted to of the infraction of the Constitution of the United States, to the rights of citizens, of property owners, as represented by this railroad in its capacity of its owning this franchise and freehold in the street (as the Court of Appeals has called it), and the owning of abutting property, for their enjoyment, and the right of a common citizen to abate a nuisance. You are then brought back to the construction, narrower than those I have suggested, whether, under a trust title so marked and described in the source of the title that it shall be forever kept open to be used as "*public streets are and of right ought to be used*," whether a structure like this, that intrudes into the road-bed of the street, divides it, partitions it, obstructs it, is, or is not, *taking property by force of law for uses that in its owners' hands before the law it was not subject to or possible to be used for*. And all the legislation that has heretofore been supported in judicial inquiries resulting certainly to the extent of authority to be involved in favor of these defendants, in the case of Kerr, has simply undertaken to say, is, *that when a horse road, with tracks and vehicles accommodated thereto*, imposed upon the *surface* and having the *surface* for traffic and transfer in all respects as *always it was used*, and "of right ought to be used," it is not a violation of the trust or of the power which was to be a fee when it was acquired by the prior owners by cession or compensation. And every decision which has undertaken to pass upon the question of a railroad track that disturbs the surface, the grade, and deranges the general and public use, or the order of its surface and grade, was a new easement, and was therefore, a new trust subversive of the trust and fee. Have people no rights as *cestui que trusts?* Can you take away property from a *cestui que trust* because you turn it into a public benefit or devote it to charity? Has any court undertaken to state that a use of this street inconsistent (so judicially held upon proofs, inspection and deliberation) with the open use of streets as they have been and of right ought to be kept, that that is a taking away which the Constitution of the State permits from abutting proprietors, from the city of New York and from public use without compensation? Have not all the adjustments of compensation and all the motives of concession been measured and governed by the maintenance

of the public street for all? *Does not a party when he buys upon the line of a street laid out*, or when he *concedes the soil in front for a street*, deal differently from what he does when he *buys or concedes on a strip of land that may be used for a market or a slaughter house?* Certainly he does.

Now, we are to be told that no court has yet told us that the immense investment of property, these lines of buildings, all framed and shaped with their present arrangement, because of and for the use of this open avenue and access, are now to be destroyed, and all their occupation absolutely superseded by an enactment that *does not take away anybody's property*, because the fee is left.

I regret, if your Honor please, to have addressed the court so long, but I believe I have placed before your Honor the general views, which I submit for your consideration.